

ARIZONA DEPARTMENT OF EDUCATION

Sara J. Vance, Hearing Officer
14014 North 8th Place, Phoenix, Arizona 85022
phone (602) 938-1810 fax (602) 938-2163

J. L. ("Student"),)	
)	
Petitioner,)	IMPARTIAL DUE PROCESS
)	HEARING DECISION AND ORDER
vs.)	
)	Hearing Dates: October 2, 3, 4, & 5, 2000
SCOTTSDALE UNIFIED)	
SCHOOL DISTRICT ("District"))	Held at: City of Scottsdale Civic Center Library
)	3839 Civic Center Boulevard
Respondent.)	Scottsdale, Arizona
_____)	

Counsel for Petitioner (and Parent):

Counsel for the Respondent:	Robert D. Haws, Esq.
	Jennings Strouss & Salmon PLC
	Two North Central, 16 th Floor
	Phoenix, Arizona 85004-2393

An index of Student's providers is attached hereto to identify specific personnel providing services to Student. That index is designed to be detached before release of this Decision and Order as a public record.

INDEX OF PROVIDERS

J.L. v. Scottsdale Unified School District

Adaptive P.E. Teacher	Ms. Jan Blocher
Back-Up Aide	Ms. Barbara Savage
Developmental Pediatrician	Audrey Griesbach, M.D.
Director of Pupil Services	Mrs. Joanne C. Phillips
ESY Private School	The Banyon Tree Learning Center, San Diego, California
ESY Private School Special Education Teacher	Ms. Glenna Coolidge
First Grade Classroom Aide	Mrs. Jo Faranelli
First Grade Physical Therapist	Mrs. Marcie Groom, P.T.
Kindergarten Classroom Aide	Ms. Carrie Coleman
Occupational Therapist	Ms. Melissa Chambers, O.T.
Parent	
Parent's Private School	New Way Learning Academy
Parent's Private School Director	Ms. Dawn Gutierrez
Principal	Ms. Carolyn Repp
Private Psychologist	Mr. Christopher Nichols, Ph.D.
Regular Classroom Teacher	Mr. Jim Welch
School	Arcadia Neighborhood Learning Center
School Psychologist	Dr. Donna Helm-Yost
Speech and Language Service Provider	Ms. Anita Werner, S.L.P.
Speech Language Pathologist	Dr. Lynn Groth, S.L.P.
Three Specified District Classrooms	Hohokam K-1-2- PLC, Pima K-1-2- PLC, and Navajo 3-4 LD

I. INTRODUCTION AND PROCEDURAL HISTORY

Parent filed the request for due process ("Due Process Request") in this matter on August 14, 2000, based on a unilateral placement of Student and related issues as set forth below.

A pre-hearing telephone conference was held on August 25, 2000, with Parent, District's counsel and a representative of District. Confirmation of that pre-hearing telephone conference, and the procedures governing the hearing process in the due process hearing ("Due Process Hearing" or "Hearing") were set forth in a letter from the Hearing Officer to the parties dated August 28, 2000 ("Pre-Hearing Confirmation"). During the telephone conference, it was determined that the Due Process Hearing would take at least four days, and due to scheduling conflicts and the availability of witnesses, District requested an extension of the 45 day time limitation for issuance of the final decision in this due process matter. Parent objected to the extension based on Parent's desire to have the matter resolved due to the costs Parent had incurred as a result of the unilateral placement of Student. The Hearing Officer agreed to extend the time period for conducting the Hearing and issuing a final decision and order for 20 days (to October 18, 2000) because: (1) Student was currently receiving educational services pursuant to the unilateral placement by Parent at the Parent's Private School, and Student would not be prejudiced in the receipt of educational services by the brief delay, (2) the parties indicated that at least four days were needed for the Hearing, and no scheduled Hearing times were otherwise available which would ensure the availability of necessary witnesses, and the availability of District's counsel and Parent.

During the pre-hearing telephone conference, Parent requested that Parent's and Student's last name be redacted from all exhibits and documents submitted for the Due Process Hearing, and that all orders issued refer to the initial rather than the last name of

Parent and Student. On August 30, 2000, the Hearing Officer issued a letter to the parties denying such request on the grounds that (1) the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. Section 1232g, does not require redaction of Parent's and Student's last name, (2) Parent's and Student's confidentiality would be appropriately protected, (3) the accuracy of the documentary evidence presented at the Due Process Hearing could be compromised if Parent's and Student's name were redacted from evidence before it is introduced, and (4) that imposing such requirement with regard to the exhibits and documents submitted would place an administrative burden on District not required by FERPA or the Individuals with Disabilities Education Act ("IDEA").

A. Pre-Hearing Motions and Rulings

1. Motion to Compel

On August 30, 2000, Parent filed a Motion to Compel Immediate Return of [Student's] Personal Portfolio, requesting (1) the immediate return of Student's original "personal portfolio" (consisting of Student's artwork, math papers, writing samples, stories that Student wrote and other class work) ("Student's Portfolio"), and (2) that District be ordered to destroy any copies of Student's Portfolio. District timely filed a Response, and Parent timely filed a Reply to the Motion to Compel. A telephonic evidentiary hearing was conducted on September 19, 2000, from approximately 2:20 p.m. to 3:30 p.m., and testimony was heard from the Regular Classroom Teacher. Pursuant to that evidentiary hearing, the Hearing Officer found that (1) Student's Portfolio was not an educational record required to be maintained by District; (2) the Regular Classroom Teacher who "maintained" Student's Portfolio considered it to be Student's (and Parent's) property, and freely returned "assessment portfolios" of other students to them when they left the School; and (3) Student's Portfolio could be of some limited relevance to the due process issues in this case. Based on those findings, District was ordered to return the original

Student's Portfolio to Parent, and destroy any copies of documents in Student's Portfolio that were not included by District in District's exhibits disclosed for the Due Process Hearing. See Order Granting in Part and Denying in Part Parent's Motion to Compel, dated September 20, 2000.

2. Parent Subpoena to District

On August 30, 2000, Parent requested that the Hearing Officer issue a Subpoena Duces Tecum ("Subpoena of Other Student Records") to the custodian of records for the District for the individualized education programs (IEPs) and the most recent evaluation report or data for all students assigned to Three Specified District Classrooms as of May 15, 2000 (with personally identifiable information redacted pursuant to FERPA). Parent also requested that several subpoenas for witnesses be issued, and they were issued. The Hearing Officer set a motion schedule with regard to the requested Subpoena of Other Student Records, and the parties timely filed their motion, response and reply. On September 18, 2000, Parent's request for issuance of the Subpoena of Other Student Records was denied (due to confidentiality issues with regard to the other students), and Parent's alternative request for an order in limine was granted (due to District's admission that it has not proposed any of the Three Specified District Classrooms as a placement for Student). See Order Denying Issuance of Subpoena Submitted by Parent and Granting Parent's Alternative Motion in Limine, dated September 18, 2000. It was ordered that District would not be allowed to introduce evidence at the Due Process Hearing (1) that any of the Three Specified District Classrooms are (or were) appropriate placements for Student, or (2) that Parent's rejection of those three classrooms was unreasonable.

3. Motion to Dismiss (Statute of Limitations)

On September 5, 2000, District filed District's Motion to Dismiss, moving to dismiss Petitioner's request for due process on the issues of (1) reimbursement of extended

school year (ESY) registration fees for the summer of 1999, and (2) the provision of an aide during the 1998-99 school year, on the theory that such claims were time barred because a one year statute of limitations applies to such claims. Parent timely filed a Response, and District timely filed a Reply to the Motion to Dismiss. The applicable statute of limitations for those two claims was set in an Order Denying [District's] Motion to Dismiss and Setting Applicable Statute of Limitations ("Statute of Limitations Order"), dated September 26, 2000, attached as **Exhibit A** hereto and incorporated herein.

4. Clarification of Issues

On August 28, 2000, Parent sent a letter to the Hearing Officer requesting clarification of one of the issues set forth in the Pre-Hearing Confirmation. That clarification was made by the Hearing Officer pursuant to a letter to the parties dated September 7, 2000, and that clarification is set forth in the list of issues below.

5. Motion For Re-Evaluation

On September 6, 2000, District filed its Motion Seeking Consent to Evaluate Child Before Resolution of the Remaining Due Process Issues ("Motion for Reevaluation"), requesting that the Hearing Officer order that Student be reevaluated before the Due Process Hearing. Parent filed a response, and District filed a reply to that motion. In an Order Denying [District's] Motion to Seeking Consent to Evaluate Child Before the Due Process Hearing, dated September 19, 2000, the Hearing Officer denied District's request for a re-evaluation of Student prior to the Hearing on the grounds that (1) the need for additional assessments and a reevaluation of Student could only properly be made after a full evidentiary hearing, and (2) Parent's right to a timely Due Process Hearing would be seriously compromised.

6. District Subpoenas Duces Tecum

District submitted four subpoenas duces tecum ("Subpoenas Duces Tecum") seeking records from Student's Developmental Pediatrician, the ESY Private School, the Parent's Private School, and the Speech and Language Service Provider. The Hearing Officer set a motion schedule with regard to the requested Subpoenas Duces Tecum, and the parties timely filed their motion, response and reply.¹ Pursuant to an Order For Issuance of Subpoenas Submitted by District dated September 18, 2000, certain time limitations and document limitations were set for the Subpoenas Duces Tecum which were then issued upon submission by District (with handwritten changes made by the Hearing Officer to comply with such Order).

7. Pre-Hearing Briefs; Witness and Exhibit Lists; Disclosure

On September 22, 2000, both parties timely submitted their pre-hearing briefs, witness and exhibit lists. Parent's disclosure of exhibits was timely made on September 22, 2000 (as ordered in the Pre-Hearing Confirmation). District's exhibits were mailed, rather than hand-delivered on September 22, 2000 (as required by the Pre-Hearing Confirmation). Parent did not object to including the District exhibits in the record at the time they were initially offered at the Due Process Hearing (based on that untimely delivery), and District's exhibits were admitted at the Hearing (as described below).

¹ Initially, the Hearing Officer received the Subpoena Duces Tecum for the office of the Developmental Pediatrician, and ordered that District provide a motion to support its request for issuance of that subpoena. See letter from Hearing Officer to parties dated September 7, 2000. The Hearing Officer subsequently received the other three Subpoenas Duces Tecum, and executed them and returned them to the District because they were to providers of educational services to Student. Parent then filed a letter requesting emergency relief regarding District's requested signed subpoenas to the ESY Private School, the Private School, and the Speech and Language Service Provider. The Hearing Officer then issued an order staying service of those Subpoenas pending a further order of the Hearing Officer. See Order for Emergency Relief Regarding Issuance of Subpoenas, dated September 12, 2000.

8. Petitioner's Motion for Partial Summary Judgment

On September 26, 2000, Parent filed Petitioner's Motion for Partial Summary Judgment or Alternatively Motion in Limine, requesting summary judgment in Parent's favor on the issue of placement, or alternatively entry of an order in limine prohibiting the District from offering evidence on issues not specifically listed in District's witness statement. Pursuant to the Pre-Hearing Confirmation, the parties were to submit a "brief statement" as to what each witness would testify. District's witness list contained such brief statements, including a statement that one witness would testify about "placement issues", and including other items for specific witnesses relevant to placement. Petitioner's Motion was denied at the Due Process Hearing prior to the submission of evidence at the Hearing. Transcript of Hearing, p. 8.

B. Due Process Issues

The due process issues to be determined in this case are set forth in the Due Process Request, as further determined in the Pre-Hearing Confirmation and the clarification letter noted above from the Hearing Officer to the parties dated September 7, 2000, as follows:

1. Is District required to pay, and did District fail to reimburse Parent for, registration fees at a private school for ESY (extended school year) programs for Student for the summer of 1999 and 2000.
2. Is District required to provide an aide for Student during class, recess, and lunch under the 1998-1999 IEP and 1999-2000 IEP, (2) Did District fail to provide such an aide during all the time periods required by the respective IEP's, (3) Did such alleged failure deny Student's right to a free appropriate public education (FAPE), and (4) Is Student entitled to compensatory education for any failure to provide FAPE due to a failure to provide such aides (including compensatory education for

alleged missed computer time for language acquisition and for social interaction at recess).

3. Is Parent entitled to reimbursement of (i) tuition, and (ii) transportation costs, for unilateral placement at a private school, and (2) Is Parent entitled to an order for placement at such private school, both issues which will be determined in part by whether Student is receiving FAPE from District under Student's 1999-2000 IEP, and specifically:

- (a) Whether District failed to provide prior written notices required to be provided under IDEA;

- (b) Whether Student's placement under Student's 1999-2000 IEP is appropriate; and

- (c) Whether Student is making "meaningful progress" under the 1999-2000 IEP (to the extent required for District to provide a FAPE to Student).

C. Evidence Introduced at Due Process Hearing

Testimony and documentary evidence were admitted at the Due Process Hearing. Fifteen witnesses testified at the Hearing. See Transcript of Due Process Hearing ("Tr."). Two Parent witnesses located in another state testified telephonically, and no objections were made to such telephonic testimony. Testimony regarding an evaluation of Student by Parent's final witness, Private Psychologist, was objected to by District on the grounds that no evaluation report was provided to District. After questioning of both parties, and a review of the applicable law, the Hearing Officer determined that it was in the Hearing Officer's discretion to allow the testimony, and the Hearing Officer allowed the testimony on the condition that the testimony would be given the appropriate weight given the District's objections. Private Psychologist's testimony was further restricted to bar reading the evaluation report into the record since the evaluation report (which was asserted to

have just been completed on the final day of the Hearing), had not been disclosed. Tr. pp. 1103-1127.

District and Parent agreed to disclosure of all exhibits submitted except as specifically objected to at the Due Process Hearing. Tr. p. 11. There was some confusion regarding two alternative lists of exhibit numbers from Parent and it was agreed that the list of exhibits included in Parent's witness and exhibit list would be used to identify Parent's exhibits but that Parent exhibit number 10 would include two documents.²

Parent had listed two tapes and transcripts of IEP meetings for Student – it was determined at the Hearing that the transcripts (which were not produced) would not be admitted into the record, but that the audio tapes of such meetings from District would be included in the record, and Parent's last tape of the May 16, 2000 meeting would be admitted into the record. Tr. pp. 1146-1147. District produced three cassette tapes of the May 16, 2000 IEP meeting containing two and one-half hours of the meeting; Parent produced a final tape with approximately 25 minutes of that meeting. Given the length of the actual meeting, those tapes do not constitute the entire meeting. After the Hearing, the tape of the November 4, 1999 meeting was produced by District but the tape produced was, for the most part, blank. District was ordered to obtain Parent's audio tape of that meeting, pursuant to a letter dated October 9, 2000, and Parent produced two cassette tapes containing two hours of that meeting which are included in the record (although the tape appeared to end before the conclusion of the meeting). Further, Parent had listed two exhibits (numbers 17 and 22) which Parent had requested from District; District was unable to locate those documents and they are not included in the record. Thus, Parent exhibits 1 through 16, 18 through 21, and 23 through 50 ("Pet. Ex.") were admitted into the

² References in the Transcript of the Hearing to Parent's exhibit numbers 11 to 50 are likely to refer to the immediately prior number.

record, and District exhibits 1 through 16 ("D Ex.") were admitted into the record. Tr. pp. 1146-1147.

II. FINDINGS OF FACT

1. On June 24, 1998, School gave Parent prior written notice that School proposed an initial placement for Student in kindergarten in the regular classroom with itinerant services in the classroom, which proposal was based in part upon a review of private evaluation reports of Student; Student's regular classroom was a K-1-2 classroom (for kindergarten, first and second graders). Pet. Ex. 2.

2. On June 24, 1998, goals and objectives were developed for Student with Parent's participation, and an individualized education plan for Student ("1998-1999 IEP") was in place when Student began attending kindergarten at School in the fall of the 1998-1999 school year. At that time, Student was identified as having delayed verbal skills, a short attention span and as being easily distracted, difficulty generalizing learned skills, fine motor and visual motor difficulty, and other physical problems. Pet. Ex. 2. Parent signed the 1998-1999 IEP. Pet. Ex. 2.

3. Student's 1998-1999 IEP provided, among other things, for one-on-one aide supervision and assistance "as necessary" during lunch and recess, with a provision that the Regular Classroom Teacher would determine if any additional aide assistance was required. The 1998-1999 IEP also set forth Student's categorical eligibility as Other Health Impaired. Pet. Ex. 2.

4. Student's Regular Classroom Teacher (for both kindergarten and first grade) is certified as both a regular and special education teacher, is widely regarded as an excellent teacher, and works well with Student. The regular classroom that Student attended (in kindergarten and first grade) used student driven curriculum, students worked independently and in small groups in the regular classroom, the other children in the

classroom were not disabled, and the Regular Classroom Teacher used a multi-sensory approach to teaching (presenting information to reach as many of the senses as possible). Tr. pp. 239-242.

5. In December, 1998, Student's 1998-1999 IEP was revised to provide for an aide in the classroom for six hours to facilitate language and attention to class activities due to Student's attentional difficulties and language needs. Pet. Exs. 2, 5 & 6.

6. In January, 1999, Kindergarten Classroom Aide began working for District as Student's classroom aide and continued to work in that position through the remainder of the 1998-1999 school year. Kindergarten Classroom Aide was a certified special education teacher who also tutored Student privately (at Parent's expense). Tr. pp. 690-691, 708. District also provided the services of a second aide to assist Student during the lunch and break periods of Kindergarten Classroom Aide from January through May, 1999. Tr. p. 697.

7. In the spring of 1999, Student's IEP team decided to extend Student's 1998-1999 IEP until the fall of 1999. Tr. pp. 137, 286, 1065.

8. In April, 1999, School tested Student using the CELF-Preschool Language Assessment, and determined that Student was more than two standard deviations below the mean for Receptive Language (the ability to understand language verbally or in writing) and Expressive Language (the ability to verbally or in writing use language, put together sentences). Pet. Ex. 9; Tr. pp. 79-80.

9. On April 12, 1999, Student's Developmental Pediatrician officially diagnosed that Student had an attention deficit disorder (due to a reticular activating system problem), recommended medical treatment for that disorder, and recommended that Student attend a summer school program (to capitalize upon his enhanced attention from the use of that medication, and from enhanced auditory discrimination and processing from participation

in Fast ForWord [described below]). Pet. Ex. 10; Testimony of Developmental Pediatrician, Tr. p. 607. Student's Developmental Pediatrician is a medical doctor who is Parent's private evaluator and has extensive experience in the evaluation and treatment of children with a wide variety of developmental and learning disabilities. Tr. p. 589.

10. In the summer of 1999, District paid for Student to receive the Fast ForWord intervention program; this is an intense computer based program that builds basic skills in comprehension, auditory processing and phonological processing, in children with language improvements. Pet. Ex. 15; Testimony of Speech and Language Service Provider. Fast ForWord is the only intensive neurologically based program that targets the type of auditory processing deficits that Student demonstrates. November 3, 1999 report of Developmental Pediatrician. Pet. Ex. 25, at 6.

11. From approximately June 21 to July 30, 1999, Student attended summer school at the ESY Private School and was also provided three hours of speech and language therapy for six weeks – these were extended school year services provided by District. Pet. Ex. 14. District paid for the 1999 extended school year services at ESY Private School but did not pay for Student's initial \$200 ESY Private School registration fee (which had been paid earlier by Parent to reserve a space for Student). Pet. Ex. 37 and testimony of Parent, Tr. p. 1063.

12. ESY Private School is an ideal learning environment with individualized one-on-one direct instruction and small group instruction, a low student-teacher ratio, small, quiet classrooms with classical music to help students relax and focus, and a multi-sensory approach. Pet. Ex. 10 (letter from ESY Private School), and testimony of ESY Private School Special Education Teacher and Kindergarten Classroom Aide (who visited the ESY Private School).

13. During the summer of 1999, Student's expressive language and ability to communicate improved, and Student had begun to read; Student was at the beginning stages of reading when Student completed Student's kindergarten year. Tr. p. 706; Pet. Ex. 13.

14. Beginning in the fall of 1999, School's Speech Language Pathologist served as the case manager for Student – he/she coordinated and initiated IEP meetings. Tr. p. 75. During the 1999-2000 school year, Speech Language Pathologist would check with Parent regarding Parent's schedule before setting the date and time of IEP meetings, and Parent never missed an IEP meeting during that school year. Tr. pp. 148-149.

15. On or about September 9, 1999, District attempted to obtain Parent's consent for individual comprehensive evaluation; this request was made at the time that Parent was involved in due process with District due to issues unrelated to this case (involving District's failure to timely locate a speech therapist for the School). Parent requested a written statement of each test proposed and the substantive rationale for each test. D Ex. 7; Pet. Ex. 17. District identified the tests requested in a letter to Parent dated September 15, 1999. Pet. Ex. 18. Those tests (other than the informal assessment for hyperlexia) were not done. Tr. pp. 483, 880-881. Parent readily consented to testing by School whenever Parent thought such testing was needed by Regular Classroom Teacher, School's Speech Language Pathologist or related service providers to provide special education and related services to Student. Parent has refused to agree to School's requests for testing of Student to obtain additional information to permit District to ascertain whether Student had additional or different disabilities as Parent does not trust the motivations of School in testing Student. Tr. pp. 877-881. Parent has provided the evaluations of Developmental Pediatrician to District.

16. From the beginning of the 1999-2000 school year through December, 1999, Regular Classroom Teacher thought that the IEP aide requirements were implemented, but Student was not provided an aide during the time that First Grade Classroom Aide took a one-half ($\frac{1}{2}$) hour lunch and a 15 minute break (during Student's recess time) every school day during that four month period. Tr. pp. 256, 299-301.

17. Initially in the 1999-2000 school year, the First Grade Classroom Aide was instructed to get Student involved in playground activities at recess, but then it was determined that the appropriate approach was to simply monitor Student and assist Student if there was a situation or if anything negative happened. Tr. pp. 349-350.

18. On October 18, 1999, Student was pushed by another student on the playground and fell and bumped his head; Regular Classroom Teacher was on the playground at the time of the incident. D Ex. 9. It was based on this event that Parent learned that District had not provided a second aide to assist Student during the lunch and break periods of the First Grade Classroom Aide in the fall of 1999. Pet. Ex. 23 & D Ex. 9; Testimony of Parent. This playground incident could have occurred regardless of the proximity of an aide. Tr. p. 350.

19. On November 3, 1999, Developmental Pediatrician (Parent's private evaluator) issued a report on an evaluation of Student performed on October 18, 1999, which provided specific recommendations regarding Student's classroom aide, but did not recommend any change in placement from the regular classroom. Pet. Ex. 25. That report stated Student had shown tremendous growth in verbal memory, language processing, and the ability to organize and formulate language, and stated that this "is clearly due to [Student's] participation in Fast ForWord." Pet. Ex. 25, at 6.

20. On November 4, 1999, a final IEP was developed for Student (after numerous team meetings, Tr. pp. 137, 225, 894), which had an anticipated duration from

November 8, 1999, to November 8, 2000 (“1999-2000 IEP”). The 1999-2000 IEP provided for: (1) Three hours of Speech/Language special education per week; (2) Related Services of Occupational Therapy (OT) 1.0 hour per week, Physical Therapy (PT) 1.0 hour per month, and Adapted Physical Education (PE) 30 minutes per week; and (3) aide assistance throughout the 6.5 hour school day, which aide was (i) to be a classroom aide for the Regular Education Teacher to free up time for that teacher to spend more time with Student, and (ii) to manage and monitor Student’s small group activities, facilitate Student’s use of the augmented communication device, and to preteach concepts to be taught in the classroom. Parent signed the 1999-2000 IEP. D Ex. 1 & Pet. Ex. 26.

21. On November 4, 1999, in the last IEP meeting held by Student’s IEP team prior to completion of the 1999-2000 IEP, the Director of Pupil Services (who oversees the special education program for the District) raised the issue of whether additional testing was needed to determine whether Student qualified for additional services based upon a possible learning disability, and there was a discussion about additional cognitive and academic testing needed to determine whether Student qualified for additional services. Parent indicated that Student did not need any more tests, but that Parent would check with Parent’s advisors regarding the requested tests, and get back to District regarding this issue. Pet. Ex. ¶ 27. Although the team extensively considered Student’s present levels of performance and needs at that time, there was no consensus that Student’s needs would not be met in the regular classroom placement, and no additional testing was conducted in response to the discussion. The overall tone of the November 4, 1999 meeting reflected concern for Student’s needs, thoughtful considerations of appropriate approaches for serving those needs, and a genuine consensus among IEP team members in addressing those needs. Pet. Ex. ¶ 27.

22. The 1999-2000 IEP noted in Student's present levels of performance and learner-based needs, among other things: (1) Student's moderate to severe hearing loss in the left ear (which required preferential seating), (2) Student's delayed receptive and expressive language skills including delayed auditory temporal processing, (3) Student's short attention span for subjects that were not of interest to Student, and distractibility of Student, and (4) various motor skills, visual perception, and visual-motor skill issues. D Ex. 1 & Pet. Ex. 26. These present levels of performance and needs are consistent with the testimony presented at the Hearing regarding Student's performance and needs.

23. In the Accommodations/Modifications section of the 1999-2000 IEP, it states that "Parent provides a laptop computer and software for [Student's] use in the classroom as well as for instructional opportunities with the SLP, classroom teacher or aide." D Ex. 1; Pet. Ex. 26. There was no specific amount of time set for Student's use of the computer or a particular software package, and that was in the discretion of the Regular Classroom Teacher. Testimony of Regular Classroom Teacher, Tr. pp. 254-255. The computer and software provided by Parent were used for only a few hours from November, 1999, through May, 2000. Testimony of Parent. Parent's view of the importance of the use of the computer and software had been brought to the attention of the IEP team during the November 4, 1999 IEP meeting. Pet. Ex. 27.

24. There was no discussion at the IEP meetings held to prepare the 1999-2000 IEP regarding the listing of Student's "Primary Disability" as "Other Health Impairment" on the 1999-2000 IEP; that listing was simply maintained by the Speech Language Pathologist from the 1998-1999 IEP. D Ex. 1, p. 1.; Testimony of Speech Language Pathologist, Tr. pp. 235-236, and Parent, Tr. pp. 941-942. District listed the "Other Health Impairment" category to ensure that Student received services District thought Student

needed, and because District could rely on a medical doctor's evaluation for that category. Tr. pp. 451-452, 471.

25. On November 17, 1999, District sent Parent a Prior Written Notice regarding the implementation of the 1999-2000 IEP with a description of extensive evaluation procedures used for such placement, including, without limitation, review of classroom grades, tests and related class work, standardized test scores, developmental histories, classroom observation and performance, academic assessment, multidisciplinary assessments, and curriculum based assessment. D Ex. 1. District relied in part on the report of Developmental Pediatrician (see ¶18 above). District believed District had sufficient evaluation information to determine Student's special education needs and related services at that time. Tr. pp. 665-666.

26. In December, 1999, the 1999-2000 IEP was revised to add that Student would receive Step 4 Word (a higher level of Fast ForWord) in the summer of 2000 (at the expense of District), and to add several handwritten objectives.

27. The 1999-2000 IEP was designed based upon the individual needs of Student. Testimony generally, and Tr. pp. 225, 236-238. The goals and objectives of the 1999-2000 IEP related to speech and language were designed to provide meaningful educational benefit to Student. Tr. pp. 229, 265-266.

28. The parties stipulated that, and the evidentiary record supports that: (a) the 1999-2000 IEP sets forth appropriate goals and objectives in the areas of occupational therapy (OT), physical therapy (PT), and adaptive physical education (PE); (b) the OT, PT and adaptive PE services set forth in the 1999-2000 IEP were provided to Student; and (c) Student made progress and met many of the objectives relating to OT, PT and adaptive PE during the time period that the 1999-2000 IEP was in place prior to Parent's unilateral placement (from November, 1999, through May, 2000). Tr. p. 34, lines 2-15; D.

Exs. 2, 3 & 4, and Testimony of First Grade Physical Therapist, Adaptive P.E. Teacher, and Occupational Therapist.

29. In January, 2000, District hired the Back-Up Aide, who provided aide services to Student through May, 2000, during the 45 minutes per day when the First Grade Classroom Aide took lunch and a break. Tr. pp. 369, 760, 778. [Back-Up Aide's testimony was inconsistent about the extent to which Back-Up Aide served as Student's aide at recess rather than as a general recess aide, but Back-Up Aide was very nervous and attempting to please everyone in responding to questions, and Back-Up Aide's overall testimony supports the provision of aide services. Compare Tr. pp. 764-765 & pp. 769-771.]

30. Sometime in March, 2000, Parent applied for admission of Student to Parent's Private School, but Parent was not certain that Student would be accepted at Parent's Private School. Tr. pp. 1081-1082.

31. On March 14, 21, and 23, 2000, Student was administered the Clinical Evaluation of Language Fundamentals Third Edition (CELF-3) by the Speech Language Pathologist. Under Student's 1999-2000 IEP, the CELF-3 was identified as the standard for determining measurements of Student's annual goals. Student who then was 7 years of age scored an age equivalent of 4 years, 10 months, on the CELF-3, which indicated gains both expressively and receptively from the CELF-preschool scores from a year before. Pet. Ex. 28 & D. Ex. 5; D Ex. 1 & Pet. Ex. 26; and testimony of Schools' Speech Language Pathologist.

32. On April 8, 2000, Speech and Language Service Provider tested Student (in preparation for providing the Step 4 Word program to Student) using the Test of Language Development – P3 (TOLD-P:3), which according to the test protocol is the best and most comprehensive estimate of a person's overall language ability. Pet. Ex. 30; Tr. p. 1015.

The report of that testing, dated April 18, 2000, shows Student's Spoken Language, Organizing, Speaking, Semantics and Syntax Quotients held steady or increased slightly from prior TOLD-P:3 testing performed by Provider on September 2, 1999. Pet Ex. 15. Student's Listening Quotient decreased, but this appeared to be due to attention difficulties on that test. Pet. Exs. 15 & 30.

33. The results of standardized testing do not fully reflect Student's abilities, in part due to Student's attending issues, and in part due to neurocognitive and neurodevelopmental problems that interfere with Student's performance on tests. Testimony of Speech Language Pathologist, Tr. p. 114-115, 162-164, and Developmental Pediatrician, Tr. p. 612; D. Ex. 5.

34. On May 4, 2000, Developmental Pediatrician issued a report on an evaluation of Student performed more than two months earlier on February 28, 2000. Developmental Pediatrician had privately evaluated Student twice a year for several years, but this May 4, 2000 report was the first time that Developmental Pediatrician had indicated that Student was not benefiting from Student's current placement in the regular classroom. The report indicated that Student needed (in Developmental Pediatrician's opinion) to be placed in a very small class with intensive individual academics. Developmental Pediatrician primarily based this opinion on: (1) findings that Student's math skills were unchanged in February, 2000, from Developmental Pediatrician's last testing of Student (using the Wide Range Achievement Test) four months earlier on October 18, 1999, (2) information obtained from Parent that Student could not negotiate socially, and (3) information obtained from Parent that Student was not getting sufficient individual attention and was unable to attend in a large group. Pet. Ex. 31. In the May 4, 2000 report, Developmental Pediatrician further indicated that a different medication for Student's attention deficit disorder would be tried. Developmental Pediatrician testified

that he/she changed his/her opinion on the appropriate placement of Student from the regular classroom with a classroom aide and appropriate services in November, 1999, to a self-contained program in May, 2000, largely based on Parent's reports regarding the functioning of the First Grade Classroom Aide, and Parent's reports on what was happening in the regular classroom, Tr. pp. 658-661, rather than on any change in Student's needs or medical condition.

35. School's Speech Language Pathologist provided the three hours per week of speech/language special education required under the 1999-2000 IEP from November, 1999, through May, 2000 (in addition to some additional compensatory education not at issue here). D. Exs. 1 & 5; Testimony of Speech Language Pathologist.

36. On May 16, 2000, approximately five days before the end of the school year, there was a meeting of Student's IEP team; although Parent and District disagree whether the meeting was an "IEP Meeting" as defined by IDEA (as the meeting was intended to be, and for several hours was, a meeting to discuss Student's progress on the goals and objectives of the 1999-2000 IEP, Tr. pp.459-460), there was a meeting of all necessary IEP team members, and at that meeting Parent gave verbal notice to District that Parent requested that Student's placement be changed from a regular classroom setting with support as set forth in Student's 1999-2000 IEP, to a self-contained classroom, a multi-sensory approach, and a small student-teacher ratio with cognitively comparable children. Parent raised the Parent's Private School as a potential placement but Parent did not provide notice of a unilateral placement at the meeting. Tr. p. 173-177; Pet. Ex. 34; Tr. p. 1074.

37. As of May 16, 2000, Parent believed the goals and objectives of the 1999-2000 IEP were appropriate, but also believed that Student's placement in the regular classroom (with an aide and related services) was not appropriate. Tr. p. 942. Parent

thought Student was making progress in the regular classroom placement but did not think that progress was meaningful in light of Student's potential. Tr. p. 943. Parent thought Student's placement in the regular classroom with an aide and related services in November, 1999, was appropriate, but during the spring of 2000, Parent worked through Parent's aversion to a placement in a self-contained classroom and decided that such a placement was needed, in Parent's view, for Student. Tr. pp. 1090-1101. Parent was concerned that the gap was not closing between Student's chronological age and age equivalent scores in speech and language. Tape of May 16, 2000 IEP meeting, Pet. Ex. 34 and Tr. pp. 945-946.

38. At the May 16, 2000 meeting of the IEP team, the Director of Pupil Services and the Principal expressed concerns about having enough information to change Student's placement from three hours of speech/language special education per week to a self-contained classroom (in part based on the least restrictive environment (LRE) under, and Student's rights under, IDEA, and in part based on ascertaining what Student could and could not do). The IEP team did reach consensus that there was a need to evaluate Student's reading comprehension and that a running reading record would be appropriate (which was consented to by Parent and performed by School, see ¶ 42 below). Although a comprehensive psycho-evaluation was mentioned by Director of Pupil Services, no member of the IEP team stated at the May 16 meeting that a comprehensive psycho-educational evaluation of Student was required before Student's placement could be changed. However: (1) the meeting had originally been called to review Student's progress, and the team had met for about an hour and a half completing that process before Parent requested a change of placement, (2) the team discussed Parent's request for more than two additional hours but no member of the IEP team was prepared to make a determination and reach a consensus on Parent's placement request because no one

had sufficient information at that time to make a determination, (3) Parent cut off any meaningful discussion about resource options as Parent did not consider it acceptable, and (4) after Parent suggested that Parent's Private School was a placement for Student, Parent cut off any meaningful discussion about the advantages or disadvantages for Student of Parent's Private School. Parent was antagonistic with anyone who did not agree with Parent at the May 16, 2000 meeting, and the general tone of the meeting was in strong contrast to the consensual nature and discussion of the November 4, 1999 IEP meeting. District did provide information on several classrooms within the District, and agreed to arrange for Parent to view those classrooms but District did not offer placement in those classrooms. Tape of May 16, 2000 meeting of the IEP team, Pet. Ex. 34.

39. In May, 2000, Student took the standard Proficiency Assessment for Writing Standards for the District, and scored the minimum score necessary to meet the standard for proficiency in writing. Also in May, 2000, Student took the standard Proficiency Assessment for Mathematics Standards for the District, and scored 100% correct in four of the six areas tested, and 88% and 50% on the other two areas tested. D. Ex. 6. Parent credits the academic progress of Student, including Student's math scores, to private services provided by Parent (as described in ¶ 47 below). Testimony of Parent.

40. By the end of the 1999-2000 school year, the Speech Language Pathologist reported that Student was making slow but satisfactory progress, that his attending behavior had improved significantly over the semester, and that his initiation of language and MLR (mean length response, which means the use of more words) increased as the year progressed. The Speech Language Pathologist saw a "dramatic difference" in improvement of Student's focusing and attending from the beginning to the end of the 1999-2000 school year, and saw Student growing, blossoming, and initiating language more in the spring of 2000. D. Ex. 5; Testimony of Speech Language Pathologist, Tr. pp.

99-117. Speech Language Pathologist's testimony of the dramatic improvement in Student's receptive and expressive language skills, and Student's improved attending during that time period are given great weight both due to the credibility of that testimony and the fact that Speech Language Pathologist's exposure to Student was limited to the 1999-2000 school year. [The Speech Language Pathologist was a very credible witness in terms of demeanor, and the consistency of testimony with documentary evidence. Additionally, Speech Language Pathologist was not an employee of District, but was an independent contractor District had contracted with, and appeared to function independently of District].

41. Student's social skills and pragmatic communication skills improved during the 1999-2000 school year, and Student became more adept at the procedures of the classroom. Testimony of Regular Classroom Teacher, Tr. pp. 272-274.

42. On May 18, 2000, the Running Reading Record test was administered to Student by School with the consent of Parent; it indicated that Student had a 99% accuracy rate at the mid-first level and a 93% accuracy level at the end first level. D Ex. 6; Tr. p. 498-499.

43. On May 18, 2000, Parent sent a letter to Director of Pupil Services, giving District formal written notice that Parent was seeking a change in placement and providing 10 days notice of Parent's unilateral placement of Student. [While the Director of Pupil Services testified that "I don't recall seeing this letter" and that "I don't remember receiving that May 18 letter", Director did not testify that Director did not receive the letter. Tr. pp. 572-573. A May 31, 2000, letter from the Director to Parent indicated that Director had "read your letter through several times [and] reviewed the discussion that took place at the May 16 meeting", and there was no production by District of any other letters from Parent

during the relevant time period to explain the specific statement regarding the letter from Parent referred to in Director's letter]. Pet. Exs. 35 & 36; D Ex. 14.

44. Student met or partially met many of the goals and objectives listed in the 1999-2000 IEP based on Student's delayed receptive and expressive language skills as of May, 2000. D. Ex. 5; Testimony of Regular Classroom Teacher, Speech Language Pathologist, and Parent.

45. Student's social skills on the playground improved during Student's first grade year, and by March 28, 2000, Student played with peers during recess activities without difficulties. Testimony of First Grade Physical Therapist, Tr. pp. 39-40, p. 44, and Occupational Therapist, Tr. p. 61; Reevaluation Consideration/Report for Physical Therapy, D Ex. 2. Student's social skills in his physical education class improved during Student's first grade year. Testimony of Adaptive P.E. Teacher, Tr. pp. 46-47.

46. Although Student sometimes had temporary problems due to medication issues in first grade, Pet. Ex. 27, there was no evidence that Student was disruptive or interfered with the education of the other children in the regular classroom.

47. Throughout the school year during kindergarten and first grade, Student received extensive private services paid for by Parent. This included (1) one-on-one tutoring from a certified special education teacher (Kindergarten Classroom Aide) for one hour 3 times per week through the kindergarten school year, and 1½ hours twice a week through the first grade school year; (2) private speech therapy once per week; (3) participation in communication language groups; and (4) music therapy. Testimony of Kindergarten Classroom Aide, Tr. pp. 690-691, 708, and Speech and Language Service Provider, Tr. pp. 1020-1021.

48. It is not possible to identify what portion of the progress Student made during the kindergarten and first grade school years was due to the extensive private services

paid for by Parent, as compared to what portion of that progress was attributable to the services provided by District. Tr. pp. 151, 337.

49. On May 31, 2000, the Director of Pupil Services, sent a letter to Parent, indicating, among other things, that the Director of Pupil Services thought Student should begin the upcoming 2000-2001 school year in Student's then present placement, and that District would review the upcoming ESY data including results of Fast ForWord2 [Step 4 Word] programming, and then perform an evaluation of present levels of performance, strengths and needs, and have an IEP meeting to review Student's IEP goals and objectives to determine Student's appropriate placement. D Ex. 14; Pet. Ex. 36.

50. On June 8, 2000, Parent sent a letter to the Director of Pupil Services for District, requesting payment of \$500 in registration fees paid by Parent for the ESY Private School: \$200 for 1999, and \$300 for 2000; this was Parent's first written request for School to pay such registration fees. Pet. Ex. 37; Tr. p. 1061. While it is unclear whether that letter was received by Director of Pupil Services for District at that time, the Director of Pupil Services for District did receive a second letter from Parent dated June 27, 2000, indicating that Parent was awaiting payment of the registration fees. Pet. Ex. 39; Testimony of Director of Pupil Services, Tr. pp. 450, 504-505.

51. On or about June 12, 2000, Student completed five weeks of the Step 4 Word language intervention program, which was paid for by District. Although the program is typically completed in five weeks, Student had not obtained a ceiling in Student's scores, indicating further possible growth. Pet. Ex. 47; Tr. p. 206.

52. On June 13, 2000, Parent sent another letter to the Director of Pupil Services for District, rejecting the terms of the May 31, 2000 letter from District, indicating (among other things) that Parent was seeking a specific decision (for agreement or denial of the requested change of placement) from District, and further indicating that Parent was

unilaterally placing Student at Parent's Private School. Pet. Ex. 38. At the time that letter was sent to the District, Parent had been verbally advised that Student was accepted at Parent's Private School. Tr. p. 989.

53. From June 15, 2000 to June 26, 2000, Director of Pupil Services was on vacation. D Ex. 15.

54. From approximately June 26 to August 4, 2000, Student attended summer school at the ESY Private School and was also provided three hours per week of speech and language therapy and one hour per week of occupational therapy, as extended school year services provided by District. D Ex. 8. District paid \$5,261.00 for those ESY Private School services but did not pay for Student's initial \$300 registration fee at the ESY Private School which had been paid earlier by Parent to reserve a space for Student. D Ex. 8; Pet. Ex. 37 & Testimony of Parent.

55. On July 6, 2000, District provided Prior Written Notice of District's determination not to make a change of placement based on (1) the good progress Student had made at School, (2) that the school team suspects another disability is responsible for Student's continued deficits in language and social skills other than the medical diagnosis which constitutes the category of other health impaired, (3) that an individual comprehensive evaluation is needed to provide sufficient information to determine present levels of performance, IEP revisions and subsequent placement recommendations, and (4) that consideration of the skills gained by Step ForWord is necessary to determine the impact on Student's progress and needs. In the July 6, 2000 cover letter accompanying the Prior Written Notice, District (Director of Pupil Services) responded to Parent's June 13, 2000 letter, indicating, among other things: "[U]ntil the impact of Step ForWord and ESY programs can be evaluated, and until further assessment can be done to determine the suspected disability, the district team is firm in it's recommendation that [Student]

continue at [District's school], and that the IEP be revised to include appropriate daily special education resource assistance (the amount to be determined by the IEP team). The letter further indicates that "we are in agreement" that Student requires a more intensive and restrictive placement, but indicates that there is not enough information for the District to proceed with a change of placement to the restrictiveness of a private day program. D Ex. 15; Pet. Ex. 40; Tr. p. 926.

56. On July 10, 2000, Parent responded to the July 6, 2000 letter from District disputing the terms of that letter. Pet. Ex. 41.

57. On July 13, 2000, Parent's Private School officially accepted Student for the 2000-2001 school year, determining that Parent's Private School was an appropriate placement for Student. Pet. Ex. 42; Testimony of Parent's Private School Director. Parent's Private School's tuition fee for the 2000-2001 school year is \$10,850.00, with an additional materials/supplies costs of \$375.00, and a \$75.00 application fee. Pet. Ex. 43; Tr. p. 990.

58. On July 25, 2000, Parent unilaterally enrolled Student at Parent's Private School for the 2000-2001 school year without the consent of District. Pet. Ex. 43.

59. On July 31, 2000, the Director of Pupil Services for District sent a document entitled "Conference Request" to Parent for a meeting on August 16, 2000, which notice stated that it was for review of existing data and consideration of re-evaluation; the cover letter sent with the request indicated that "an IEP team meeting notice" was enclosed, and that the meeting was to discuss the need for reevaluation of Student, prior to consideration of a significant change of placement. The letter further indicated that if the date or time was not agreeable to contact District to reschedule. Pet. Ex. 44. District did not call Parent on the telephone before scheduling that meeting, but Parent made no attempt to have the meeting rescheduled although Parent was unable to attend the meeting at that

time. Parent did request that the meeting be audio taped, but District did not do so. Pet. Ex. 45; Tr. pp. 931-932.

60. On August 14, 2000, Parent filed the request for a due process hearing in this matter.

61. On August 16, 2000, members of Student's IEP team (other than Parent) met, and Director of Pupil Services indicated that a comprehensive psycho-educational evaluation was needed. Tr. pp. 331-332. A four page Reevaluation Consideration/Report dated August 16, 2000, was issued by District, indicating, among other things, that additional assessments of Student were needed – specifically that the following new tests and evaluation materials are needed: cognitive assessment, academic assessment, behavioral/personality assessment, and functional skills assessment. D Ex. 7. The Report states that Parent was an "IEP Team Participant" although Parent was unable to, and did not, attend the noticed August 16, 2000 IEP team meeting. Testimony of Parent, Tr. pp. 931-933, Speech Language Pathologist, Tr. p. 220, and Regular Classroom Teacher, Tr. p. 331. Parent did not receive a copy of the Reevaluation Consideration/Report until the day of the pre-hearing telephone conference in this matter, August 25, 2000.

62. District understands state law to require that any cognitive test to be accepted by District must be performed by a psychologist licensed in Arizona, and views a cognitive test (together with an academic assessment) as the most appropriate way to determine eligibility for learning disabilities. Tr. pp. 404-408, 481.

63. On August 16, 2000, in connection with Student's completion of five weeks of the Step 4 Word program, Speech and Language Service Provider tested Student using the Test of Language Development – P3 (TOLD-P:3), and prepared a report (dated August 17, 2000), which included test results from April 8, 2000 testing of Student (see Pet. Ex. 30) and the August 16, 2000 testing. Pet. Ex. 47; Tr. p. 1015. Those test scores

show an improvement in Student's Spoken Language Quotient of one full standard deviation, an increase in the Listening Quotient of approximately two standard deviations, an improvement in the Semantics quotient of one and one half deviations, and an increase in the Speaking Quotient of one full standard deviation, with little improvement in the Organizing and Syntax Quotients, from April 8, 2000, to August 16, 2000. These test scores actually indicate that Student is within or approaching the average range on 5 of 6 measurements, but Student continues to have significant language difficulties. Testimony of Speech and Language Service Provider; Pet. Ex. 47. While it is not certain whether the Step 4 Word or other events during the April to August, 2000, period caused the score increases, the vast majority of children participating in the Fast ForWord or Step 4 Word programs make meaningful gains, and Student's Developmental Pediatrician thought much of Student's gain from February, 2000, to September, 2000, was due to the Step 4 Word program. Tr. pp. 1053-1054; p. 641.

64. On August 25, 2000, District gave Prior Written Notice to Parent regarding District's proposal to conduct a comprehensive evaluation based on District's Reevaluation Consideration/Report dated August 16, 2000. District did not send any written notice to Parent requesting Parent's consent for a reevaluation of Student from May 16, 2000, until August 25, 2000. D Ex. 7.

65. On August 21, 2000, ESY Private School issued a written report regarding Student's present levels of performance, and provided recommendations for Student, including: small class size; one-on-one direct, explicit instruction; and a multi-modal approach. D Ex. 8. These recommendations were consistent with the service delivery provided to Student at ESY Private School, and the recommendations of Student's ESY Private School Special Education Teacher. Testimony of Student's ESY Private School Special Education Teacher.

66. Parent, who is an attorney, has been very devoted to Student's education throughout Student's life, and has zealously protected Student's and Parent's rights under IDEA in Parent's interaction with School personnel, especially with regard to District and School administrators (as opposed to direct providers of services to Student). Testimony of Parent and Director of Pupil Services; Pet. Exs. 8, 19, 21, and 24. This has created considerable conflict between Parent and District administrators, especially with regard to differences in opinion with regard to what the law requires. Tr. p. 468.

67. Parent, the Regular Classroom Teacher and the Speech Language Pathologist worked well together, all service providers for Student worked very well together, and most service providers worked well with Parent in the 1999-2000 school year. Testimony of Regular Classroom Teacher (Tr. pp. 243-245), Speech Language Pathologist (Tr. pp. 111-112; 133-134, First Grade Physical Therapist (Tr. p. 42), and Parent.

68. The evidence uniformly indicated that Student did better in structured than non-structured environments, and that Student performed better when Student was directly involved or interested. Student has more difficulty staying focused and staying on task in large group than in small group situations. To some extent that is true of many first graders. Tr. pp. 61-62, 253, 352.

69. District agrees that Student, like many other students, would benefit from a smaller class size and a smaller student to teacher ratio. Tr. p. 466.

70. Regular Classroom Teacher testified that he/she hoped that Student would be placed in Regular Classroom Teacher's classroom for the 2000-2001 school year because Student would have continued to be successful there. Based on the progress Student had made, and Regular Classroom Teacher's understanding of Student's strengths and weaknesses, Regular Classroom Teacher felt that Regular Classroom

Teacher could take him to the next step. Tr. p. 271. [Parent believes that Regular Classroom Teacher's views regarding placement should be discounted because of Regular Classroom Teacher's close rapport with Student, Tr. p. 103, but while Regular Classroom Teacher's testimony was not always credible as Regular Classroom Teacher attempted to balance the conflict between the close relationship that Regular Classroom Teacher had formed with Parent against the concerns of the District, there is no doubt that Regular Classroom Teacher was interested in doing what Regular Classroom Teacher thought was best for Student.]

71. Kindergarten Classroom Aide (a certified special education teacher who graduated from college in December, 1998, and who has provided tutoring services to Student paid by Parent for more than two years), testified that Parent's Private School was an appropriate placement for Student, and the regular classroom was not an appropriate placement for Student. However, Kindergarten Classroom Aide formed his/her opinion that the regular classroom was not an appropriate placement in Student's kindergarten year in January, 1999, but never shared that long-held opinion with anyone at the School or with Parent. Since that opinion directly contradicts the determinations of two IEP teams for Student, it is not persuasive. Tr. pp. 748-749.

72. Speech and Language Service Provider (who has been providing private services to Student at Parent's expense as well as providing the Fast ForWord programs to Student at Parent's request but at District expense) and ESY Private School Special Education Teacher testified that Student needed a small structured environment to ensure that Student stayed focused. Tr. pp. 847-48, 1024-1025. There was no evidence presented at the Hearing that Student's ability to focus had consistently decreased from November, 1999; there was evidence that Student's ability to focus had increased. Tr. pp. 99-117.

73. Although at the Due Process Hearing, Developmental Pediatrician testified that the regular classroom was not an appropriate placement because Student would not receive the type of language support that Student needs in order to progress adequately in academics, that justification regarding the regular classroom setting was not presented to District in the May 4, 2000 report of Developmental Pediatrician. Tr. p. 631.

74. Parent's Private School Director identified Parent's Private School as an appropriate placement for Student, and indicated that Student was doing well at Parent's Private School. Pet. Ex. 42; Testimony of Parent's Private School Director, Tr. pp. 980-985. Student still has problems with attending at Parent's Private School and continues to need re-direction. Tr. pp. 635-655. Parent's Private School is certified by the Arizona Department of Education for ED (emotional disability), LD (learning disability), and Speech or Language Impairment. Tr. p. 482. District would have to determine that Student fit into one of these categories, or Parent's Private School would have to apply for certification in other health impairment before District could place Student in Parent's Private School. Tr. p. 482.

75. Student qualifies for the eligibility category of speech language impairment, but that category may or may not represent Student's primary disability. Testimony of Speech and Language Service Provider, Tr. p. 1032; Testimony of Developmental Pediatrician, Tr. p. 634; Testimony of Director of Pupil Services (who is certified in speech and language). Tr. p. 475.

76. On August 18 and 21, 2000, after Parent had filed Parent's due process request, Student was evaluated by Parent's Private Psychologist. Tr. p. 1105. Private Psychologist reported his/her findings to Parent long before the Due Process Hearing, but did not provide a "final" report until Private Psychologist testified on the final day of the Hearing, and that report was not disclosed to District. Tr. pp. 1143. Private Psychologist's

description of Student's functioning based on the evaluation were generally consistent with the other evidence of Student's functioning during Student's first grade year that was presented at the Hearing. Tr. pp. 1129-1139. No weight is given to Private Psychologist's conclusion that Student has many features that are consistent with a nonverbal learning disability syndrome (and that it fits the attention deficit disorder profile which goes along with nonverbal disability syndrome), Tr. pp. 1129, 1132, because: (1) Private Psychologist's testimony was only allowed pursuant to the Hearing Officer's discretion based on what the Hearing Officer finds was Parent's intentional evasion of IDEA's "five day rule"; (2) District was not afforded an opportunity to review the final report of Private Psychologist in order to effectively cross-examine Private Psychologist regarding either the basis for Private Psychologist's findings or cross-examine or provide rebuttal testimony regarding the veracity of the testing procedures performed as part of the evaluation, and (3) Private Psychologist's findings are not relevant to the determination of District's proper provision of FAPE to Student.

III. CONCLUSIONS OF LAW; RATIONALE

A. Burden of Proof.

The Ninth Circuit Court of Appeals has consistently held that the school has the burden of proving compliance with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400, et. seq., at the Due Process Hearing. Seattle School District v. B.S., 82 F.3d 1493, 1498 (9th Cir. 1996); Clyde K. Ex rel. Ryan K. v. Puyallup School District, 35 F.3d 1396, 1398 (9th Cir. 1994). Burden of proof is the duty of affirmatively proving a fact in dispute. District has the burden of proving, by a preponderance of the evidence, that District has complied with the requirements of IDEA, and provided a free appropriate public education ("FAPE") to Student.

B. Registration Fees at ESY Private School for 1999 and 2000

The first issue in this due process determination is: Is District required to pay, and did District fail to reimburse Parent for, registration fees at a private school for ESY (extended school year) programs for Student for the summer of 1999 and 2000?

District agreed to provide ESY services for Student at the ESY Private School for the summers of 1999 and 2000, and Parent paid registration fees for Student of \$200 for the summer of 1999, and \$300 for the summer of 2000 to the ESY Private School. Findings of Fact (“FOF”) ¶¶ 11, 50.

District is required to provide Student a “free” appropriate public education; “free” means “provided at public expense” and “without charge”. 20 U.S.C. § 602(8)(A). Extended school year services are to be provided to a child with a disability at “no cost” to the parents of the child. 34 C.F.R. §300.309(b)(1). Student could not attend the ESY Private School without payment of the registration fees, and Parent’s delay in requesting payment of such fees does not change District’s legal obligation. Pursuant to the Statute of Limitations Order, Parent’s claim, which is in the nature of restitution, is not barred by the statute of limitations. Thus, District is obligated to pay Parent for such registration fees, and Parent prevails on this issue.

C. Implementation of Aide Requirement for 1998-1999 School Years

The second issue in this due process determination is: (1) Is District required to provide an aide for Student during class, recess, and lunch under the 1998-1999 IEP and 1999-2000 IEP, (2) Did District fail to provide such an aide during all the time periods required by the respective IEP’s, (3) Did such alleged failure deny Student’s right to a free appropriate public education (FAPE), and (4) Is Student entitled to compensatory education for any failure to provide FAPE due to a failure to provide such aides (including

compensatory education for alleged missed computer time for language acquisition and for social interaction at recess).

During the fall of the 1998-1999 school year, District was only required to provide one-on-one aide supervision and assistance “as necessary” during lunch and recess. FOF ¶ 3. During the spring semester of the 1998-1999 school year, and the fall semester through November 7, 2000, an aide was also to be provided for Student in the classroom for six hours [in addition to the lunch and recess aide (“as necessary”)]. FOF ¶ 5. An aide was provided appropriately from January, 1999, through May, 1999, as District provided not only Kindergarten Classroom Aide, but also a back-up aide for Kindergarten Classroom Aide’s lunch and break. FOF ¶ 6. From the beginning of the school year in August, 1999, through November 7, 1999, District did not provide a back-up aide to implement the 1998-1999 IEP. FOF ¶¶ 3, 5 & 16.

Beginning November 8, 2000, through May, 2000, under the 1999-2000 IEP, aide assistance was to be provided throughout the 6.5 hour school day, which aide was (i) to be a classroom aide for the Regular Education Teacher to free up time for that teacher to spend more time with Student, and (ii) to manage and monitor Student’s small group activities, facilitate Student’s use of the augmented communication device, and to preteach concepts to be taught in the classroom. FOF ¶ 19. From November 8, 2000, to December, 2000, District failed to provide an aide during the one-half (½) hour lunch period and fifteen minute break period of Student’s classroom aide. FOF ¶ 16.

Free appropriate public education (FAPE) means special education and related services provided at public expense and provided in conformity with the IEP required by IDEA. 20 U.S.C. §1401(8) (emphasis added). See also Board of Education v. Rowley, 458 U.S. 176 (1982) (citing the FAPE requirements set out in IDEA). A reduction in the amount of time that an aide is provided that is not linked to Student’s individual needs, but

is instead due to labor laws or District's staffing considerations, is not appropriate. See Adams v. State of Oregon, 195 F.3d 1141, 1151 (9th Cir.1999). The question, however, is whether this failure to provide an aide for 45 minutes per day is sufficient to determine that FAPE was no longer provided to Student. There are few if any IEPs that are perfectly implemented. There could be factual situations where the assistance of an aide is so crucial to the special education being provided to a child that failure to provide such aide assistance would rise to a violation of FAPE, but determination of a FAPE violation will turn on the facts present here.

First Grade Classroom Aide took a fifteen minute break during Student's recess time. With regard to the fifteen minutes of recess during the time period that the 1998-1999 IEP was in place, an aide was only required for that period of time "as necessary". Given that the 1998-1999 IEP requirement was limited to providing as aide "as necessary", there was no failure to provide such an aide. Although Student once bumped his head on the playground during that period, that could have happened at any time with or without an aide, and while regrettable, it does not demonstrate a failure to provide FAPE to Student. FOF ¶ 18.

With regard to the fifteen minutes of recess during the six to seven week time period that the 1999-2000 IEP was in place, there is evidence that during some portion of this time, the First Grade Classroom Aide was generally being used to monitor Student on the playground, rather than actively interact with Student. FOF ¶ 17. Even if an aide would have facilitated Student's social interaction on the playground for that fifteen minutes per day, the absence of the aide for six to seven weeks for fifteen minutes per day at recess in this case does not rise to the level of a FAPE violation.

The failure to provide required IEP aide assistance during First Grade Classroom Aide's one-half (½) hour daily lunch break is more serious because that aide was required,

but not provided, from August, 1999, to December, 1999. FOF ¶¶ 5, 16 & 20. It is not as easy to quantify the benefits of an aide assisting a student in classroom work as it is to quantify provision of a related service. However, the continued failure to provide a classroom aide determined to be necessary by Student's IEP team for such an extended period of time is a failure to provide FAPE.

Parent seeks compensatory education on this failure to provide an aide during this time on Parent's intent and understanding that Student was to use a computer and software provided by Parent during the time First Grade Classroom Aide took lunch. However, there was no specific time requirement set for using the computer and software in the 1999-2000 IEP, and the Regular Classroom Teacher understood that Student's use of the computer was left in his/her discretion. FOF ¶ 23.

Compensatory education is not a contractual remedy, but an equitable remedy. In determining whether compensatory education is provided, the question is not what precise services were missed, but rather, what compensatory services are necessary to provide an appropriate education within the meaning of IDEA. Student W. v. Puyallup School District, 31 F.3d 1489, 1497 (9th Cir. 1994). The effectiveness of Student's education was reduced for one-half (½) hour per school day for approximately four months due to the lack of an aide to assist Student. This reduction of service can be compensated for by twenty hours of tutoring services provided by District. Parent prevails on this issue.

D. Unilateral Placement of Student

The third, and most significant, issue in this due process determination is: (1) Is Parent entitled to reimbursement of (i) tuition, and (ii) transportation costs, for unilateral placement at a private school, and (2) Is Parent entitled to an order for placement at such private school. With regard to whether Student is receiving a free appropriate public education (FAPE) from District under Student's 1999-2000 IEP, Parent specifically raised

the sub-issues of : (a) whether District failed to provide prior written notices required to be provided under IDEA; (b) whether Student's placement under Student's 1999-2000 IEP is appropriate; and (c) whether Student is making "meaningful progress" under the 1999-2000 IEP (to the extent required for District to provide a FAPE to Student).

Parent's main contention, however, is that Student's placement should have been changed (as of the beginning of the 2000-2001 school year) from (a) the regular classroom with three hours of speech/language special education and related services provided inside and outside the regular classroom, and a full-time aide, to (b) a separate self-contained classroom with a small student-teacher ratio, using a multi-sensory approach (as is used in Student's regular classroom placement), and with cognitively comparable children.

Parent is entitled to reimbursement for the cost of Parent's unilateral enrollment of Student at Parent's Private School, without the consent of District, only if District had not made a FAPE available to Student in a timely manner prior to that July 25, 2000 enrollment. 20 U.S.C. § 1412 (a)(C)(ii). In order to obtain reimbursement of the tuition for the Parent's Private School, the private school placement of Parent must be proper under IDEA, and Student's 1999-2000 IEP calling for placement in the regular classroom (with special education and related services) must be inappropriate. School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 370 (1985).

1. District's Provision of FAPE

The United States Supreme Court has established a two part test to determine whether a FAPE is provided. First, have the procedures set forth in IDEA and its regulations been complied with. Second, is the IEP developed through these procedures "reasonably calculated to enable the child to receive educational benefits." Board of Education v. Rowley, 458 U.S. 176, 206-207 (1982).

a. Procedural FAPE Issues

Failure to follow the procedures set forth in IDEA can result in a denial of FAPE if such failure either (1) results in the loss of educational opportunity, or (2) seriously infringes the parents' opportunity to participate in the IEP formulation process. W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479, 1484 (9th Cir.1992). Parent has not alleged any procedural violation in the creation of the 1999-2000 IEP. Parent participated in the IEP meetings, worked with School employees to develop the goals and objectives in the 1999-2000 IEP, and agreed to Student's placement in the regular classroom in November, 1999. FOF ¶¶ 20-21.

Parent alleges that District failed to provide a timely prior written notice regarding District's refusal to change Student's placement. Parents must be provided prior written notice (and information on procedural safeguards) if the school proposes (or refuses) to initiate or change the educational placement of a child. 20 U.S.C. §1415(b)(3) & (c); 34 C.F.R. §300.503(a)(1). That prior written notice must be provided within "a reasonable time". 34 C.F.R. §300.503(a)(1). District did not provide the prior written notice (and procedural safeguards) required by IDEA in refusing Parent's May 16, 2000 request for a change of placement, until July 6, 2000. FOF ¶ 55. Although District sent a letter to Parent on May 31, 2000 (indicating that District desired to wait to make a placement determination until August, 2000 to permit the IEP team to consider Student's appropriate placement after consideration of Student's performance and needs after completion of the Step 4 Word and ESY Private School services to be provided to Student and funded by District), District did not comply with IDEA's prior written notice requirements on May 31, 2000. FOF ¶¶ 49 & 52. Parent, as an attorney who is very familiar with IDEA's requirements and procedural safeguards, did not require delivery of the notice of procedural safeguards required by IDEA [20 U.S.C. §1415 (d)] to understand Parent's

rights. Parent did however require a prior written notice otherwise complying with IDEA in order for Parent to know that District had refused to change Student's placement. Even for Parent, who has a sophisticated knowledge of IDEA, the elaborate and highly specific procedural safeguards of IDEA are very important. Rowley, 458 U.S. at 205. The requirement of a formal prior written notice creates a clear record of when District actually refused to change Student's placement. The formal prior written notice also gave Parent sufficient assurance of District's position to allow Parent to decide whether to unilaterally place Student and/or pursue Parent's due process rights under IDEA. See Union School District v. Smith, 15 F.3d 1519, 1526 (9th Cir. 1994) (requiring educational agencies to offer formally an appropriate educational placement, and determining that such requirement has an important purpose that is not merely technical, and should be enforced rigorously).

However, District's position is made clear in the appropriate Prior Written Notice dated July 6, 2000, given to Parent. FOF ¶ 55. At that point, Parent knew that District did not intend to change Student's placement until District had obtained information on Student's progress resulting from the Step 4 Word program, and sufficient objective information to determine whether a self-contained classroom was an appropriate placement under the requirements of IDEA. Parent's Private School did not officially accept Student for the 2000-2001 school year until July 13, 2000, and Parent did not make the unilateral placement at Parent's Private School until July 25, 2000. FOF ¶¶ 57 & 58. It may or may not have been reasonable for District to wait for six to seven weeks to provide prior written notice of the refusal to change Student's placement (in the summer when Student was not receiving services in the regular classroom placement). But, there has been no loss of Student's educational opportunity, and thus no denial of FAPE. 960 F.2d at 1484.

b. Educational Benefits

The 1999-2000 IEP must be “reasonably calculated to confer a meaningful educational benefit” on Student. Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir.1999). One determination used in measuring whether a child benefits from the placement is whether there is progress toward the central goals and objectives of the IEP. County of San Diego v. California Special Education Hearing Office, 93 F.3d 1458, 1467 (9th Cir. 1996). Student has made progress toward the goals and objectives of the 1999-2000 IEP in Student’s regular classroom placement. FOF ¶¶ 31-32 & 40-41. School’s Speech Language Pathologist’s testimony of the dramatic improvement in Student’s receptive and expressive language skills, and Student’s improved attending during that time period, are given great weight. FOF ¶ 40. Testing of Student, although not fully reflecting Student’s abilities, indicated that Student made progress on Student’s expressive and receptive language skills even if such progress did not meet Parent’s expectations. FOF ¶¶ 31-33. Even if such progress cannot be separated from the private services provided by Parent, FOF ¶ 47, it weighs in favor of District’s provision of FAPE.

In this case, Student has benefited from private services during the 1999-2000 school year, and the benefits of the school-provided and private-provided services cannot be separated. FOF ¶ 47. Under these factual circumstances, the Ninth Circuit Court of Appeals has decided that progress alone is not the appropriate test to determine meaningful educational benefit. Rather, the appropriate standard is whether the 1999-2000 IEP “was appropriately designed and implemented so as to convey [Student] with a meaningful [educational] benefit.” Adams, 195 F.3d at 1149. “We do not judge an [IEP] in hindsight; rather, we look to the [IEP’s] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [Student] with a meaningful benefit.” Adams, 195 F.3d at 1149. District established

that the goals and objectives on the 1999-2000 IEP were individually designed for Student so as to convey meaningful educational benefit. FOF ¶¶ 27-28. District established that the speech/language special education, related OT, PT, and adaptive PE related services, and related aide services (as to the time period from January to May, 2000) were provided as set forth in the 1999-2000 IEP, and thus the goals and objectives of the 1999-2000 IEP were implemented so as to provide Student with a meaningful educational benefit. FOF ¶¶ 28 & 35.

Student's educational placement was determined by the 1999-2000 IEP which was prepared in accordance with law. 34 C.F.R. §300.552. IDEA requires, to the maximum extent appropriate, that children with disabilities be educated with children who are not disabled, and that removal from the regular education environment occur only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412(a)(5). In considering whether a placement is appropriate, the Ninth Circuit has determined that the necessary considerations are: (1) the educational benefits of full-time placement in the regular classroom; (2) the nonacademic benefits of such placement; (3) the effect the disabled child has on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. Sacramento City Unified School District v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994).

As described above, the 1999-2000 IEP was both appropriately designed and implemented so as to convey Student with a meaningful educational benefit in the regular classroom. See Gregory K. v. Longview School District, 811 F.2d 1307, 1314 (9th Cir.1987) ("We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide [the child] with educational benefits."). Although there was evidence that sometimes Student did not attend in the regular classroom or was

distracted, the Regular Classroom Teacher was confident and credible in his assertion that Student would continue to be successful in the regular classroom. FOF ¶¶ 22 & 70. There was no evidence of any adverse changes in Student's educational needs or physical condition from November, 1999 (when the 1999-2000 IEP was put in place for a one year period), to May, 2000, when Parent requested a change in placement. Although Student's Developmental Pediatrician changed her opinion as to the appropriate classroom environment for Student (from November, 1999, to May, 2000), that change was based on testing done in February, 2000, just four months after the 1999-2000 IEP was put in place, and information Developmental Pediatrician had obtained from Parent (which information was either not consistent with the specific terms of the 1999-2000 IEP or not consistent with the evidence presented at the Due Process Hearing). FOF ¶ 34. Given the grounds for this change of opinion, Developmental Pediatrician's evaluation report is not sufficient to establish that District was not providing FAPE in Student's regular classroom (with an aide and related services) at that time, or would not be providing FAPE in the fall of 2000 based on that placement.

On July 25, 2000, Parent unilaterally enrolled Student in Parent's Private School. FOF ¶ 58. Thus, the relevant question is whether District had made a FAPE available to Student in a timely manner prior to that enrollment. 20 U.S.C. § 1412 (a)(C)(ii). Several of Parent's witnesses testified that a small classroom with a low student to teacher ratio was necessary for Student to stay focused, but there had been no adverse change in Student's focusing ability from November, 1999, to May, 2000. FOF ¶ 72. Most of the opinions by Parent's witnesses who were advocating Parent's desired placement were formulated after Parent had requested a change of placement. FOF ¶¶ 65 & 72-74. No opinions (other than the Developmental Pediatrician's May 4, 2000 report) discussed above, were

available to the District for consideration before the July 6, 2000 refusal to change Student's placement, and Parent's unilateral enrollment of Student at Parent's Private School on July 25, 2000. FOF ¶¶ 34, 55 & 58. District agrees that Student, like many other students, would benefit from a smaller class size and a smaller student to teacher ratio. FOF ¶ 69. But, even if Student would be benefited, an "'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child," Gregory K., 811 F.2d at 1314 (quoting Rowley, 458 U.S. at 197 n. 21, 201).

Parent argues that it could be projected in May, 2000, that the regular classroom placement in August, 2000, would not provide FAPE. This argument is based on Parent's assertion that Student's speech and language skills improved more rapidly over the summer than during the school year; Parent asserts that this proves that a self-contained classroom like the ESY Private School must be provided in order to provide FAPE to Student. First, although there was some evidence of some greater improvement of Student's speech and language skills over the summer of 1999 than during the 1998-1999 school year, Parent's own Developmental Pediatrician attributes great improvement based on Student's participation in the Fast ForWord program paid for by District. FOF ¶ 19. Thus, Parent's own expert did not credit Student's progress on speech and language to the ESY Private School. Even if Student did progress in an ideal learning environment at ESY Private School, that does not mean that the District must provide such an ideal environment during the school year to provide FAPE to Student.

There was also evidence of improvement of Student's speech and language skills over the first grade year. FOF ¶¶ 31-32 & 40. There was evidence that Student was performing academically as expected for a first grader. FOF ¶ 39. This was the

information District had at the time Parent made a request for a change of placement and subsequently gave notice of a unilateral change of placement. FOF ¶¶ 38 & 43.

Prior to Parent's unilateral enrollment on July 25, 2000, District did not have information on how well Student would progress based on the extended school year services that District was providing to Student in the summer of 2000. District did not know how much Student would benefit from the Step 4 Word program. District did not have any recommendations regarding the needs of Student from the ESY Private School. FOF ¶ 65. District did not have any information regarding how those summer programs paid for by District would change Student's present levels of performance.

Although District could not have known how much Student would have improved in the summer of 2000, those improvements support, rather than detract from, District's July 6, 2000 position that District needed information on the skills Student would gain over the summer to make an appropriate placement decision. The August 16, 2000 test of Student's overall language ability showed a dramatic improvement in Student's overall language ability indicating that at that time Student was within or approaching the average range on 5 out of 6 measurements. FOF ¶¶ 63 & 32.

Again, Parent asserts that the improvement of Student over the summer of 2000 when Student had attended ESY Private School (at District expense) establishes that a classroom program like the ESY Private School must be provided for Student. But, Student's dramatic improvement is more likely to have resulted from Student's participation in Step 4 Word (also provided at District expense) than attendance at the ESY Private School. Step 4 Word is an intense program that is designed to provide, and typically results in, meaningful gains in language for many children. FOF ¶ 63. Parent's own Developmental Pediatrician attributed Student's dramatic score increases in Student's

language testing to the Step 4 Word program. FOF ¶ 63. Evidence that District has been providing extended school year services that have generated great progress in Student do not establish that Student's classroom placement was or would be inappropriate. Despite District's willingness to acknowledge on July 6, 2000, that Student needed a more restrictive and intensive placement, an IEP team with information on Student's current levels of performance could determine that a fully self-contained program is not an appropriate placement for Student based on Student's increased language abilities. District is obligated to provide only "a basic floor of opportunity" through a program individually designed to provide educational benefit to Student. Union School District v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994). When Student's 1999-2000 IEP had already provided such a program in the regular classroom in May, 2000, District was not in a position to determine that Student should be moved to a fully self-contained program in August of 2000 without appropriate consideration of Student's needs at that time. When Parent unilaterally placed Student in Parent's Private School on July 25, 2000, District was not given that opportunity.

The second relevant factor for placement considerations is the nonacademic benefits of such placement. Student's social skills increased during the 1999-2000 school year. FOF ¶¶ 41 & 45. Student interacted with children who are not disabled in the regular classroom, and was able to model behavior on those peers. FOF ¶ 4. District's placement in the regular classroom provided nonacademic benefits to Student.

The effect of Student on the Regular Classroom Teacher and the other children in the class is the third consideration. A classroom aide had been provided for Student, not only to assist Student directly, but also to assist Regular Classroom Teacher so Regular Classroom Teacher could spend time with Student without other students in the classroom

suffering from lack of attention. See Rachel H., 14 F.3d at 1401. Regular Classroom Teacher was unequivocal in Regular Classroom Teacher's desire to have Student return to his classroom. FOF ¶ 70. Although Student sometimes had temporary problems due to medication issues, there was no evidence that Student was disruptive or interfered with the education of the other children in the classroom. FOF ¶ 46. Thus, the third factor also supports Student's placement in the regular classroom.

Parent asserts that the costs of Parent's Private School are less than the costs of mainstreaming Student in the regular classroom. No evidence was submitted with regard to the costs of maintaining Student in the regular classroom with a full-time aide and related services, as compared to the cost of Parent's Private School. Thus, cost is not a relevant consideration in this case.

District was obligated by law to have any determination made for a change of placement of Student made (1) by a group of persons (including Parent) knowledgeable about Student, the meaning of the evaluation data, and the placement options, and (2) in conformity with the least restrictive environment requirements. 34 C.F.R. §300.552(a). On July 6, 2000, District recognized that Student might be benefited by a more intensive and restrictive placement, and District was willing to consider such a placement. But District was not in a position on July 6, 2000, or at any time prior to Parent's unilateral placement on July 25, 2000, to legally justify the requested placement change from three hours of speech and language special education per week (with other related services) to a self-contained classroom (with other related services). District needed additional information and appropriate evaluations of Student before District would be in a position to determine the appropriate placement of Student.

District prevails on this issue.

E. Arizona Regulation Findings

The Arizona regulations governing due process standards for special education require that a hearing officer render findings of fact and a decision on specific identified issues. Ariz. Admin. Code § R7-2-405(H)(4). Those specific issues are addressed as follows:

(i) The evaluation procedures utilized in determining Student's needs have been appropriate in nature and degree through the date of Parent's unilateral placement. Although District had discussed and requested additional testing of Student in the fall of 1999, under the factual circumstances of this case, it was reasonable for District to rely on the private evaluations of Developmental Pediatrician (along with other extensive evaluation information) to determine Student's needs. FOF ¶¶ 15, 21 & 25. Parent had not agreed to allow additional testing of Student to ascertain whether Student had additional or different disabilities. FOF ¶ 15. But, District had sufficient evaluation information to "identify Student's special education and related service needs". 34 C.F.R. §300.532(h). FOF ¶ 25. Under the factual circumstances of this case, District's desire to have additional testing of Student in 1999 was not sufficient to require District to seek due process to obtain additional assessments of Student over Parent's objections. See 34 C.F.R. § 300.505(b).

(ii) The diagnostic profile of Student on which the placement under the 1999-2000 IEP was based is substantially verified. Student's 1999-2000 IEP lists Student's "Primary Disability" as "Other Health Impairment". Although this disability category was not discussed in the fall of 1999 by the IEP team, the evaluation reports by Parent's Developmental Pediatrician and other evaluation information was sufficient to substantially verify this category, which is defined as "having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness

with respect to the educational environment” that is “due to chronic or acute health problems such as . . . attention deficit disorder” and “adversely affects a child’s educational performance.” FOF ¶¶ 9 & 24; 34 C.F.R § 300.7(c)(9). Most importantly, District had sufficient information to identify Student’s special education and related service needs, whether or not commonly linked to the “Other Health Impairment” category in which Student had been classified, and to provide for such needs. FOF ¶¶ 24, 25 & 27; 34 C.F.R. §300.532(h). Student would also have qualified for the eligibility category of “speech or language impairment”, which definition includes “a language impairment” that “adversely affects a child’s educational performance”. FOF ¶ 75; 34 C.F.R § 300.7(c)(11). While it would have been appropriate to list a speech or language impairment as a category of disability for Student on the 1999-2000 IEP, that category may or may not have represented Student’s primary disability. District listed the “Other Health Impairment” category to ensure that Student received services District thought had to be provided, and District did provide those services. FOF ¶¶ 24, 28 & 35.

(iii) The evidence presented, and the conclusions of law set forth herein establish that Student’s rights have been fully observed.

(iv) The placement has been determined to be appropriate to the needs of Student. As extensively analyzed above, Student’s placement was appropriate at the time that Parent unilaterally enrolled Student in Parent’s Private School.

(v) The placement of Student in the special education program is with the written consent of Parent. Parent signed both the 1998-1999 IEP and the 1999-2000 IEP. FOF ¶¶ 2 & 20. No evidence was presented that Parent objected to Student’s placement in the special education program.

IV. ORDER

IT IS ORDERED that:

(1) District shall pay Parent \$500.00 (to reimburse Parent for registration fees paid by Parent to the ESY Private School) on or before October 31, 2000.

(2) District shall provide twenty hours of tutoring services to Student. Those tutoring services shall be provided at a time convenient to Parent, and shall be provided in minimum time allotments of no less than one hour. The subject matter of the tutoring shall be at Parent's discretion, and may include having a tutor assist Student in using software programs provided by Parent if a computer to run such programs is reasonably available to District. The total twenty hours shall be provided on or before March 31, 2001. District and Parent may agree to any time schedule for providing such services as are acceptable to both parties.

(3) Parent is not entitled to reimbursement of tuition or related costs for Parent's unilateral placement of Student at Parent's Private School. Parent is not entitled to an order for placement at Parent's Private School.

V. APPEAL

Either party has the right to appeal this Decision to the Office of Administrative Hearings within thirty five (35) calendar days after receipt of this Decision. Notice of Appeal may be sent to: Arizona Department of Education, Exceptional Student Services, 1535 W. Jefferson, Phoenix, Arizona 85007.

Ordered this 18th day of October, 2000.

By _____
Sara J. Vance
Due Process Hearing Officer

Mailed (via Certified Mail,
Return Receipt Requested) this 18th
day of October, 2000, to:

Phoenix, Arizona
Parent

Robert D. Haws, Esq.
Jennings Strouss & Salmon PLC
Two North Central, 16th Floor
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Counsel for District
CMRR # 7099 3220 0002 2006 1443

Ms. Theresa A. Schambach
Dispute Resolution Coordinator, Exceptional Student Services
Arizona Department of Education
1535 West Jefferson
Phoenix, Arizona 85007
CMRR # 7099 3220 0006 0747 0547

Mailed this 18th
day of October, 2000, to:

Ms. Joanne C. Phillips
Director of Pupil Services
Scottsdale Unified School District
8505 East Valley View Road
Scottsdale, Arizona 85250
